SUPREME COURT NO. DA 10-0069

IN THE SUPREME COURT FOR THE STATE OF MONTANA

MM&I, LLC, A MONTANA LIMITED LIABILITY COMPANY Appellant, v. BOARD OF COUNTY COMMISSIONERS OF GALLATIN COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF MONTANA, AND JOHN DOES 1 THROUGH 3, Appellees	

BRIEF OF APPELLANT

On Appeal From Montana Eighteenth Judicial District Court, Gallatin County,

Before The Honorable John C. Brown

Appearances:
Michael S. Kakuk, Attorney
Kakuk Law Offices, PC
P.O. Box 624
White Sulphur Springs, MT 59645
Attorney For Appellant

Jennifer L. Farve, Atty.
Moore, O'Connell & Refling
P.O. Box 1288
Bozeman, MT 59771-1288
Attorney For Respondent

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STATEMENT OF THE CASE

Nature of the Case:

The Appellant, MM&I, LLC (MM&I), submitted an application for preliminary subdivision plat approval to the Gallatin County Commissioners (Commission) in May 2003. Citing unmitigated impacts to the statutory primary review criteria, the Commission denied the application by a vote of 2 to 1 on June 24, 2003. MM&I appealed the denial to district court.

Procedural Disposition:

No issues of material fact being present, the Commissioners and MM&I submitted cross motions for summary judgment. The District Court decided in favor of the Commission on December 16, 2009. MM&I appeals this decision.

STATEMENT OF THE FACTS

- MM&I submitted an application for preliminary subdivision plat approval to the Gallatin County Board of County Commissioners. Commissioners Smith-

Mitchell and Vincent voted to deny the application due to unmitigated impacts. (Complaint at 4.)

- The Traffic Impact Study concluded that there would be no significant impacts to traffic or traffic safety resulting from the proposed development. (MM&I Summary Judgment Response Brief, page 3, line 3.)
- There was no other evidence presented regarding traffic impacts. (Ibid, page 5, line 4.)
- Commissioners Smith-Mitchell and Vincent determined that there would be unmitigated traffic impacts resulting from the proposed development. (Ibid, page 4, line 16.)
- The Public School Superintendent Benz found that there would be no material impacts to education resulting from the proposed development. (Ibid, page 9, line 13.)
- Commissioner Vincent placed into the record a nine-month old newspaper article stating the Superintendent Benz' concerns regarding development in general on the school system. There was no other evidence presented regarding school impacts. (Ibid, page 9, line 18.)
- Commissioners Smith-Mitchell and Vincent determined that there would be unmitigated impacts to education services resulting from the proposed development. (Ibid, page 9, line 12.)

- The County Sheriff expressed concerns regarding a need for more deputies. (Ibid, page 8, line 4.)
- MM&I offered mitigation which was accepted by the Sheriff. There was no other evidence presented regarding law enforcement impacts. (Ibid, page 8, line 11.)
- Commissioners Smith-Mitchell and Vincent determined that there would be unmitigated impacts to law enforcement resulting from the proposed development. (Ibid, page 7, line 24.)
- The Commissioners required mitigation. (MM&I Summary Judgment Brief, page 14, line 12.)
- The Commissioners did not consult with MM&I. (Ibid, page 14, line 17.)

STANDARD OF REVIEW

Issue 1. Did the District Court err in not considering deposition testimony?

Applicable Standard of Review:

. . . we review a district court's admission or exclusion of evidence for an abuse of discretion in the context of a summary judgment ruling.

Apple Park, LLC v. Apple Park Condominiums, LLC, 208 Mont. 284, 345 Mont. 359, 192 P.3d 232, at ¶ 12.

Issue 2. Did the District Court err in ruling that the Commission's decision to deny the subdivision was not arbitrary?

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Applicable Standard of Review:

We review de novo a district court's grant of summary judgment, using the same standards applied by the district court under M.R. Civ. P. 56.

Ibid. at ¶11.

Issue 3. Did the District Court err in ruling that the County did not violate section 76-3-608(5)(b), MCA?

Applicable Standard of Review:

We review de novo a district court's grant of summary judgment, using the same standards applied by the district court under M.R. Civ. P. 56

Ibid.

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ARGUMENT

ISSUE 1. DID THE DISTRICT COURT ERR IN NOT CONSIDERING DEPOSITION TESTIMONY?

Summary:

The Commissioners are required to base their decisions on the facts and evidence in the record. In their deposition testimony Commissioners Smith-Mitchell and Vincent admitted they based their decision on their own personal opinions and beliefs and not on facts or evidence in the record. These personal opinions and beliefs are not supported by the record.

Argument:

The Commission abused its discretion when it denied the proposed development without any evidence in the record to support such denial. (Complaint at ¶24, page 10.) MM&I conducted extensive discovery, including depositions, in order to document that the Commissioners' denial was not based on fact. MM&I presented the deposition testimony to clearly establish that the Commissioners admitted that they did not have any evidence but instead denied based on their own personal opinions and beliefs. (MM&I Summary Judgment Response Brief starting at page 3, line 13.)

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The District Court, citing *Kiely Construction LLC v. City of Red Lodge*, 2002 MT 241, 312 Mont 52, 57 P.3d 836, declined to consider the deposition testimony because:

> *. . . this deposition testimony was not part of the record on appeal. See Kiely ¶¶69, 97.*
>
> Opinion at 4.

The District Court misapplied the *Kiely* test in this case.

In *Kiely* the Supreme Court refused to consider non-record testimony because that testimony was not relevant to the issues. (*Kiely*, 2002 MT 241 at ¶94 and ¶95.) That is not the case here.

As explained to the District Court, the Commissioners are required under statute to base their decision on the **evidence presented**. (See, for example, MM&I Summary Judgment Brief, beginning at page 8, line 15.) The deposition testimony was presented to the District Court to specifically to show that there was **no evidence in the record** to support the Commission's decision.

> *Likewise, MM&I's use of deposition testimony is not an attempt to "re-create the record". . . . Rather, the deposition testimony is used to clearly show that Commissioners Smith-Mitchell and Vincent had no facts in the existing record on which to base a denial but instead used their own unsupported beliefs and opinions.*
>
> MM&I Summary Judgment Reply Brief, page 2, line 20.

This makes the deposition testimony relevant and admissible under *Kiely*.

This reading of *Kiely* has already been adopted by this Court:

> *The standard of review of an informal administrative decision is whether the decision was arbitrary, capricious, or unlawful. It was appropriate for the District Court, in applying that standard, to accept new evidence and not to limit its review to the administrative record. In a proceeding to determine whether an agency decision was arbitrary, capricious, or unlawful, unless the reviewing court looks beyond the record to determine what matters the agency should have considered, it is impossible for the court to determine whether the agency took into consideration all relevant factors in reaching its decision.*
>
> *Aspen Trails Ranch LLC v. Simmons, Elliot, and the Helena City Commission*, 2010 MT 79, at ¶53. (Internal citations omitted and emphasis added.)

MM&I presented the depositions to show that the Commissioners abused their discretion by ignoring facts and evidence in the record and instead based their decision on their own personal opinions and beliefs. (See, as one example, MM&I Summary Judgment Response Brief at pages 3 and 4.) MM&I presented the depositions to allow the District Court to look beyond the record to determine the matters the Commission should have considered. The Commissioners are required to base their decision on the evidence in the record. (See the discussion of *Sorenson* et al. on page 21 of the Brief.) The deposition testimony makes it clear that there was no evidence in the record to support the Commissioners' finding, making the deposition testimony relevant and admissible under *Kiely* and *Aspen Trails*.

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ISSUE 2. DID THE DISTRICT COURT ERR IN RULING THAT THE COMMISSION'S DECISION TO DENY THE SUBDIVISION WAS NOT ARBITRARY?

Summary:

Commissioners Smith-Mitchell and Vincent voted to deny the subdivision because of "unmitigated impacts". There are no facts in the record that justify or otherwise support a finding of unmitigated impacts resulting from the proposed development. The findings by Commissioners Smith-Mitchell and Vincent are based on their own personal opinions and beliefs. Since such opinions and beliefs are unsupported in the record, the decision to deny was arbitrary and capricious.

Argument:

There is no evidence in the record to justify any Commission finding of unmitigated impacts. (MM&I Summary Judgment Brief beginning at page 3.) The District Court used the same unsubstantiated conclusions as the Commission and made the following remarks.

Traffic Impacts:

The District Court first quotes Commissioner Vincent's alleged "findings" regarding traffic impacts. (Opinion at 5.) However, the quote used by the District Court itself states that Commissioner Vincent's concerns were based on his opinions and beliefs.

> *In his opinion, the study does not reflect the real world utilization of the Frontage Road given jobs in Bozeman and school in Belgrade. He believed*

> *there would be much more utilization of the Frontage Road than the study indicates . . .*
>
> Ibid. (Emphasis added.)

MM&I agrees that Commissioner Vincent did not believe the Traffic Impact Study (TIS). However, there are no facts to support Commissioner Vincent's belief. This Court is being asked to allow County Commissions, and other similarly situated local government bodies, to simply make a finding that the sky is orange - when the facts presented in the record clearly show that the sky is blue.

The District Court, without providing any "validation" or referencing any facts or evidence supporting Commissioner Vincent's opinions and beliefs, then states:

> "*Commissioner Vincent's concerns are <u>further validated</u> as follows:*
> . . .
> *Safety factors such as no shoulders, unregulated left hand turns and additional gravel trucks were noted.*"
>
> Ibid. (Emphasis added.)

Even assuming the District Court has properly read the record, see the below paragraph, these statements are not "facts". They are, at best mere conjecture, by a County Commissioner with no special training or expertise regarding traffic matters. Commissioner Vincent's vague and non-specific concerns were based entirely on his personal opinions and beliefs. (MM&I Summary Judgment Response Brief, page 4, line 19.) Those concerns are never "validated" or substantiated as actual fact in the record. The District Court never cites to any

evidence or fact in the record to "validate" or substantiate these concerns, nor could it, since no facts exist. So Commissioner Vincent's concerns regarding "*safety factors*" do not "further validate" anything. There is no evidence and no fact in the record to substantiate or validate these concerns.

MM&I must also point out that the District Court misread the Journal regarding Vincent's concerns. The "*safety factors*" referenced by the District Court were actually brought up by MM&I's own traffic engineer Bob Abelin. And based on the TIS prepared by Abelin, the mitigation measures proposed by MM&I would fully mitigate these "*safety factors*". After considering the proposed mitigation, the TIS stated:

> *The proposed development would have a small impact on the traffic conditions along Springhill Road and the Frontage Road and would have a negligible impact on traffic outside the area.*
>
> MM&I Summary Judgment Response Brief at 3.

But despite this clear evidence in the record that all impacts would be fully mitigated, and acting on nothing more than their own personal beliefs and opinions, Commissioners Smith-Mitchell and Vincent dismissed the expert testimony and the TIS and found unmitigated impacts.

The fact that these concerns were based solely on their own opinions and beliefs is clearly admitted in the disputed deposition testimony. (Ibid.) But even without the deposition testimony, there is simply no evidence in the record to justify the

findings.

The District Court states that "*Testimony at the public hearing also revealed traffic concerns by adjacent property owners.*" (Opinion at 5.) The "*testimony*" referenced by the District Court consists of the following:

> *He* (County Planner Jason Karp) *had also received <u>a call</u> from adjoining property owner Erlene Mazuranich reiterating her concern about . . .safety of Airport Road . . . .*
>
> Gallatin County Commissioners' Journal No. 47, p. 404. Included as Exhibit 4 to MM&I's Summary Judgment Response Brief. Emphasis added.

And:

> *He* (Mr. Haggerty) *spoke briefly on the traffic issue.*
>
> Ibid, p. 405

That's the total extent of the "*testimony*" concerning traffic concerns by adjacent property owners cited by the District Court to support a finding of unmitigated impacts. MM&I is not even sure that Mr. Haggerty's brief comments on "*the traffic issue*" were actually concerns (he may have actually stated that he loved more traffic). But even assuming they were concerns, these concerns are not facts - they were, at best, opinions of neighbors - and they are insufficient to overcome the undisputed findings of the TIS. And the TIS, **as a matter of fact**, clearly stated that these "concerns" were fully evaluated and mitigated below the level of significance by the proposed mitigation.

The District Court, citing *Christianson v. Gasvoda*, then declares that "*the Commission was not required to agree with MM&I's traffic expert*" and further notes that MM&I did not cite any authority contradicting *Christianson*. (Opinion at 8.) The District Court has again misunderstood MM&I's argument. MM&I never argued that the Commissioners were required to "agree" with the TIS. MM&I maintains, consistent with Montana law, that without some credible evidence in the record, the Commissioners cannot simply disregard the expert testimony and the TIS and substitute their own unsupported personal opinions and beliefs. (MM&I Reply Brief at 2.)

Regarding *Christianson*, the District Court is correct that MM&I did not cite any contradictory authority.[1] But MM&I does not wish to contradict the *Christianson* holding that the Commissioners are "*in the best position to weigh conflicting testimony*". But, unlike in MM&I's case, the expert in *Christianson* actually **changed his own expert testimony**. The District Court even emphasized this true example of "*conflicting testimony*" itself by underlining that fact in its decision. (Opinion at 6.) In MM&I's case there is **no conflicting testimony**. There is the expert testimony and the TIS, both of which state the traffic impacts will be fully mitigated, and then there are the Commissioners' opinions, based on

[1] However, MM&I did point out to the District Court that *Christianson* was decided using an outmoded standard of review and had never been cited in any other case in Montana or elsewhere. (MM&I Sur-Response at 2.)

no facts, but rather based on nothing but their own personal opinion and belief, that the impacts are not mitigatable. Those opinions and beliefs are not based on any fact or any evidence in the record and, therefore, those opinions and beliefs are unreasonable and arbitrary. (See again the discussion of *Sorenson* et al. on page 21 of the Brief.)

Additionally, the findings of unmitigated impacts in *Christianson* were based on substantial and clear evidence. (MM&I Sur-Response at 2.) In contrast, MM&I's traffic engineer did not change his testimony, nor can the minimal "testimony" in the record (one phone call) regarding traffic concerns be even considered a fact, much less substantial or clear evidence.

Had there been any "*conflicting testimony*" in this case it would have been legal and proper for the Commissioners to weigh that conflicting evidence - but there simply was **no conflicting testimony** in this case regarding traffic or any other impacts. The TIS found no unmitigated impacts, and there was no other credible evidence presented.

In wrapping up its discussion of traffic impacts, the District Court states:

> *The Commission weighed the conflicting evidence of the traffic study with the testimony of concerned members of the public, and also factored in safety issues noted in the study itself*[2]. *Combining this evidence* (the one phone call) *with the Commissioners Vincent and Smith-Mitchell's own experiences with Frontage*

[2] Again, the District Court apparently fails to understand that all the traffic impacts noted in the TIS were fully mitigated below the level of significance. (MM&I Summary Judgment Response Brief, starting at page 5, line 7.)

> *Road and the surrounding area enabled the Commission to find that public health and safety would be adversely impacted by increased traffic from the Subdivision.*

Opinion at 6. Emphasis and editorial comment added.

Therefore, the District Court is actually saying that a mere statement from the County Planner regarding one phone call from a neighbor who stated she had a concern - but not even providing any testimony regarding unmitigatable impacts - can properly outweigh a TIS prepared by a certified traffic engineer. This is not "*conflicting evidence*" and does not represent a fair reading of *Christianson*.

MM&I prepared a TIS, required by the County, that found that all adverse impacts were mitigated below the level of significance as required by section 76-3-608(4), MCA. As explained to the District Court in oral arguments, had there been any credible evidence to refute the conclusions of the TIS and support a finding of unmitigated impacts, this case would not have been filed. (Oral Argument Transcript, beginning at page 62, line 6.) Despite the District Court's language, there simply was no credible evidence to "*combine with the Commissioners' own experiences*" and the decision to deny was based entirely on their own unsupported personal opinions and beliefs.

> *In short, there is simply no "reason" in the record to find any unmitigated traffic impacts resulting from the proposed subdivision. Therefore denial based on such impacts is, by definition, "un-reasonable", and therefore - under the County's own definition - the denial is arbitrary and capricious, and therefore illegal.*

MM&I. Summary Judgment Response Brief, page 7, line 19.

Police Impacts

In four sentences the District Court finds that mitigation of the development's impact on police services "*was not possible*." (Opinion at 7.) This again represents a misreading of the record.

The record actually shows that the Gallatin County Sherriff submitted his "*standard letter*" regarding his office's lack of deputies. MM&I proposed mitigation which was accepted by the Sherriff. Despite this mitigation, adequate in the Sherriff's eyes, and offering no justification, Commissioners Smith-Mitchell and Vincent simply found that the proposed mitigation was inadequate. (MM&I Summary Judgment Response Brief beginning at page 7, line 23.)

Again MM&I argues that, without some credible justification in the record that the mitigation is inadequate, the Commission is unjustified, both literally and legally, in making such a finding regarding police impacts. (Ibid, page 9, line 7.)

Education Impacts

As part of the development review process, MM&I is required to ask for a letter from the School Superintendent regarding the impact of this specific development on local schools. Superintendent Benz submitted such a letter which stated that there would be "*no material impacts*" from the development. (MM&I Summary Judgment Response Brief, page 9, line 15.) But Commissioners Smith-Mitchell

and Vincent, and eventually the District Court, ignored this project-specific statement of no impact because Superintendent Benz had, nine months earlier and before MM&I's development was even being considered, made a statement in the newspaper about growth's general impact on the school system. (Ibid, line 19.) The District Court then compares Superintendent Benz's project-specific finding of no impact and his earlier comments in the newspaper and declares them to be "*contradicting statements*". (Opinion at 7.)

There simply is no contradiction - the Superintendent was asked to comment on MM&I's impact to the school system and he plainly stated that there would be no material impact. He did not change his opinion, nor is there anything in the record in conflict with his opinion that **this specific development** would have no material impacts of the school system. It was unreasonable for the Commission to take a newspaper article out of context and claim that it is the "justification" to make a finding of unmitigated impacts on education.

The Commissioners made no determination of what the impact might be and made no response to the subdivision-specific letter which said the subdivision had no impact on the school - other than to question the veracity of the Superintendent

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by stating that the project-specific letter "*was not an accurate reflection of the truth.*" (MM&I Summary Judgment Response Brief, page 9, line 24.)[3]

Again MM&I argues that, without some credible evidence, without some justification in the record that the Superintendent was wrong, the Commission is unjustified, both literally and legally, in making such a finding regarding impacts to local schools. (MM&I Summary Judgment Response Brief, page 10, line 3.)

Public Policy Impacts

This Court has recently declared that "*it is the developer's duty to provide all the information to the governing body for its consideration in reviewing an application for preliminary plat approval*" Hansen v. Granite County, 2010 MT 107, at ¶30. That is exactly what MM&I did in the present case.

MM&I presented a TIS prepared by a licensed, competent, professional engineer that found no significant adverse impacts. But the Commission, with no supporting facts in the record, simply "disregarded" it because they didn't believe the results. MM&I presented a project-specific letter from the School Superintendent stating that there would be no impacts to the school system. But the Commission, with no supporting facts in the record, ignored that letter in favor of a nine-month old newspaper article. MM&I proposed mitigation for impacts to

[3] The District Court states that "*the Commission also found unacceptable unmitigated impacts on local services, agriculture, and other review criteria*". (Opinion at 6.) However, apart the issues discussed above, the District Court provides no additional basis for its decision.

police services. But the Commission, again with no supporting facts in the record, ignores the Sherriff's acceptance of MM&I's proposed mitigation.

This Court has clearly established the appropriate standards for reviewing arbitrary and capricious actions by local government.

> *As this Court stated in* Grant v. Michaels, *. . . the members of the board of county commissioners, conducting a 'hearing' in their quasi judicial capacity, are the triers of the facts, and, consequently, cannot arbitrarily and capriciously disregard competent, credible, and undisputed evidence and decide the matter before them 'as they see fit,' without evidence supporting their decision. A determination reached and rendered in arbitrary and capricious disregard of unimpeached testimony is 'against law.'*
>
> *Sorenson v. Board of County Com'rs of Teton County*, (1978) 176 Mont. 232, 577 P.2d 394, 397. (Internal citations omitted and emphasis added.)
>
> *Certainly, the Board of County Commissioners would be acting arbitrarily if it disregarded All evidence of matters which by the terms of the statute it should consider.*
>
> *Gunderson v. Board of County Com'rs of Cascade County*, (1979) 183 Mont. 317, 599 P.2d 359, 361. (Emphasis in the original.)
>
> *If the statute gives to the board the right to decide the question of affirming or reversing the county superintendent's order as it sees fit, the members are not vested with discretion, but with arbitrary power. 'Discretion does not mean the arbitrary will or merely individual or personal view.'*
>
> *State ex rel. Taylor v. Board of County Com'rs of Missoula County*, (1954) 128 Mont. 102, 270 P.2d 994, 999. (Internal citations omitted and emphasis added.)

Montana statutes also clearly establish that the County "*may not unreasonably restrict a landowner's ability to develop land*" and that any decision to deny a

proposed development must include the "*facts . . . that form the basis of the decision*". (Sections 76-3-608(5)(a) and 76-3-620(3), MCA, respectively.)

In this case, as set out above, there were no facts in the record to justify the denial and Commissioners Smith-Mitchell and Vincent admit that the decision was based on their own unsupported personal opinions and beliefs. Such denial is therefore arbitrary and capricious on its face.

If the District Court's ruling is allowed to stand, Commissioners across the State will understand that they do not need **any credible evidence** in the record to ignore proposed mitigation or to support their findings. In other words, if they "find" an impact, then under this case, there "is" an impact - without ever having to articulate the facts that support that finding. The County was very honest regarding its position and continually argued that the findings themselves were justification for denial. (See MM&I Summary Judgment Reply Brief, beginning at page 7, line 20.)

MM&I stands by its original response to this argument:

> *So apparently what the County is actually saying here is that: "If we say it - it's a fact." All they have to do is make a finding in the record and then, as if by magic, the record supports the findings. While this circular reasoning may be somewhat tautologically or rhetorically amusing, it is logically invalid, legally wrong, and dangerous public policy.*
>
> MM&I Summary Judgment Reply Brief, page 8, line 21.

The District Court's opinion is a clear violation of the principals of good government, existing case law, and existing statute which all require that the **findings be based on evidence** not that the **findings are themselves evidence**. (See again <u>*Sorenson*</u> et. al and section 76-3-620(3), MCA. as discussed above.)

> *Allowing this decision to stand would send a dangerous message to local governments that it is now legal to simply disregard all the evidence and deny subdivisions based on nothing more than the personal and factually unfounded opinions or beliefs of government officials. The public policy implications of this position are important and dangerous.*
>
> *The County argues that it is not arbitrary and capricious, in other words, that it is legal to:*
> - *review the facts showing that all impacts have been mitigated;*
> - *ignore those facts based on nothing more than unsupported opinions and beliefs;*
> - *make a finding that there are unmitigated impacts; and*
> - *deny the subdivision.*
>
> *If the County is correct, there will be no more appeals under the arbitrary and capricious standard. For there will be no more standard. This "findings = facts" argument flies in the face of Montana's land use statutes and case law interpreting those statutes – their argument flies in the face of even the County's own cases cited in support that argument.*
>
> > As discussed above, we review the city commission's decision for an abuse of discretion. That is, whether the city commission's zoning decision was <u>soundly based in fact</u>.
> >
> > <u>Town and Country</u>, *Pp. 25. Emphasis added.*
>
> MM&I Summary Judgment Reply Brief, beginning at 9.

Neither the County's denial of the proposed development, nor the District Court's decision upholding such denial, were based on fact. Those decisions are therefore arbitrary and capricious and must be overturned.

ISSUE 3. DID THE DISTRICT COURT ERR IN RULING THAT THE COUNTY DID NOT VIOLATE SECTION 76-3-608(5)(B), MCA?

Summary:

The Commissioners required mitigation to reduce some of the perceived or alleged impacts resulting from the proposed development. At no point did the Commissioners consult with MM&I regarding the required mitigation. Therefore, the Commissioners failed to comply with the statutory requirements found in section 76-3-608(5), MCA.

Argument:

The Commissioners failed to comply with the requirements of section 76-3-608(5), MCA which states:

> *(5) (b) When requiring mitigation under subsection (4), a governing body shall consult with the subdivider and shall give due weight and consideration to the expressed preference of the subdivider.*

Despite clearly requiring mitigation, the Commissioners failed to consult with MM&I regarding the mitigation. (MM&I Summary Judgment Brief, starting at 11.)

The District Court, while admitting that the Commissioners must consult with MM&I, then goes on to say that because the Commission found unmitigated impacts, they were not required to consult with MM&I. (Opinion at 8.)

The District Court also states:

> *A plain reading of the statute does not support MM&I's argument that it required the Commission to consult with MM&I regarding any deficiencies with MM&I's proposed mitigation.*
>
> Ibid.

This is an incorrect analysis of the plain meaning of the statute. Nowhere in section 608(5) does the issue of mitigation "deficiencies" arise. The statute simply requires the Commission to consult with MM&I when requiring mitigation. Therefore, instead of worrying about unmitigated impacts, the analysis should be a straightforward two-part test:

1. Did the Commissioners "require mitigation", and, if so;

2. Did they "consult with" MM&I?

As explained to the District Court, the County did indeed require mitigation but clearly failed to consult with MM&I regarding such mitigation. (MM&I Summary Judgment Brief, starting at page 14, line 12, and see especially MM&I Summary Judgment Reply Brief, page 11, line 12 for a list of County-required mitigation.)

The District Court itself states that the Commission found MM&I's mitigation, mitigation required by the County, to be inadequate. (Opinion at 5, 6, and 7. See

especially the District Court's findings regarding the offered and rejected mitigation regarding police services at 7.) Yet, despite this finding of unacceptable mitigation, again, mitigation which was required by the Commissioners, the record is clear that the Commissioners did not consult with the subdivider. (MM&I, Summary Judgment Brief, beginning at page 12, line 3.)

It is unclear exactly how the District Court interprets section 76-3-608(5), MCA, but it looks like the District Court may be adding a phrase to the existing law so that it reads: "*When* approving a subdivision and *requiring mitigation* . . ." Again, there is no reference in section 608(5) to being only applicable to "approved subdivisions" and inserting such language into the statute violates the very principals of statutory construction. The District Court cannot insert words that have been omitted. (See section 1-2-101, MCA.)

Regardless of the District Court's exact interpretation of the language, if such interpretation allows the Commissioners to require mitigation without consultation with MM&I, the statute is rendered meaningless. Again violating the principals of statutory construction. (Ibid.) The District Court's decision regarding this issue should be reversed and remanded.

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CONCLUSION

MM&I maintains that there were no facts or other evidence in the record to justify a finding of unmitigated impacts and, therefore, the decision was arbitrary and capricious. MM&I also maintains that the Commission failed to comply with section 76-3-608(5), MCA by failing to consult with MM&I regarding required mitigation.

Therefore, MM&I asks that this Court:

1. find that the Commissioners failed to comply with section 76-3-608(5), MCA;
2. find that the Commissioners acted in an arbitrary and capricious manner;
3. reverse the District Court Decision; and;
4. remand this matter back to the District Court for a trial on damages.

RESPECTFULLY DATED AND SUBMITTED: MAY 25, 2010:

_____
Michael S. Kakuk

CERTIFICATE OF COMPLIANCE

I, Michael S. Kakuk, Attorney for the Plaintiff/Appellant hereby certify that the foregoing brief is proportionately spaced, using Times New Roman font, point size 14, with a count of 5,400 words.

_____
Michael S. Kakuk

CERTIFICATE OF MAILING

I hereby certify that on May 25, 2010, I served a copy of the foregoing APPELLANT'S BRIEF to the Respondent's Attorney of Record, postage prepaid:

ALLAN H. BARRIS
JENNIFER L. FARVE
MOORE, O'CONNELL & REFLING
P.O. BOX 1288
BOZEMAN, MT 59771-1288

_____
Michael S. Kakuk,
Attorney for the Appellant

APPENDIX

- District Court Order on Summary Judgment Motions, dated December 16, 2009